NO. X06-UWY-CV-18-6046436-S:	SUPERIOR COURT
ERICA LAFFERTY, ET AL.:	COMPLEX LITIGATION DOCKET
V.:	AT WATERBURY
ALEX EMRIC JONES, ET AL.:	December 16, 2022

NO. X-06-UWY-CV18-6046437-S:	SUPERIOR COURT
WILLIAM SHERLACH:	COMPLEX LITIGATION DOCKET
V.:	AT WATERBURY
ALEX EMRIC JONES, ET AL.:	December 16, 2022

NO. X06-UWY-CV-18-6046438-S:	SUPERIOR COURT
WILLIAM SHERLACH, ET AL.:	COMPLEX LITIGATION DOCKET
V.:	AT WATERBURY
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MEMORANDUM IN RESPONSE TO DISCIPLINARY COUNSEL'S MEMORANDUM AS TO ATTORNEY NORMAN PATTIS, ESQ.

Pursuant to the Court's directive, Respondent, Norm Pattis, Esq. through his Attorney, Wesley Mead, Esq. submits the instant memorandum.

INTRODUCTION

The circumstances at issue here, speak at the very most, to an innocent mistake or misinterpretation of a Confidentiality Order that had recently been amended. (the subject Confidentiality Order was amended on March 7, 2022).

Aside from our position that a disciplinary violation has not been proved here, the undersigned respectfully contends that even if the Court determines otherwise, any suspension is disproportionate and should not be ordered. To suspend Attorney Pattis on this record would make this a case-first of its kind, to punish a lawyer so severely for an inadvertent error, misreading or misinterpretation of a Confidentiality Order. In this regard, the Court should consider that for years prior to March 7, 2022, all parties were operating on a confidentiality order that read "counsel of record", and not "counsel of record in this action", and in none of the confidentiality orders was the term "counsel of record" ever defined.[1] Undoubtedly, if the pre-March 7, 2022 language had remained, these proceedings would not have been initiated.

The foregoing is salient as Attorney Lee[2] was "counsel of record" as of April 17, 2022 in the Texas Bankruptcy proceedings, and Attorney Reynal was "counsel of record" in the Texas state court litigation and the testimony revealed defense counsel (as did Plaintiffs' respective counsel) collaborated on a joint defense/prosecution.

In sum, below we will show that the record in these proceedings does not prove, and is not deserving of attorney discipline. An inadvertent error under these circumstances is insufficient and does not rise to the level of a violation of any of the disciplinary rules or statutes cited by Disciplinary Counsel and does warrant attorney discipline.

In reaching its decision the Court should be cognizant and consider that Attorney Pattis is a well-respected attorney in the legal community, Connecticut as a whole with

[1] Disciplinary Counsel does not address where in any of the Confidentiality Orders that "of-counsel" attorneys are automatically excluded.
[2] Attorney Lee testified that he does not use term "counsel of record" in Texas. (Tr. August 25, 2022 at 149).

national recognition, with no disciplinary history, who has had a long and honorable career as one of the top litigators in Connecticut, who taking on his ethical duty as an attorney to represent unpopular[3] clients zealously but within the bounds of ethics.

It would be a disservice and deprivation to the citizens of the State of Connecticut and across the United States, to impose discipline based on this record and to suspend Attorney Pattis as a result.

"If a court disciplines an attorney, it does so not to mete out punishment to an offender, but [so] that the administration of justice may be safeguarded and the courts and the public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession." (Internal quotation marks omitted.) *Statewide Grievance Committee v. Shluger*, 230 Conn. 668, 674-75 (1994).

Suspending Attorney Pattis would deprive the courts and public of an experienced and zealous advocate and serve no purpose other than a punishment. The conduct—to the extent that the Court finds it to violate the Rules of Professional Conduct—would be best addressed through further education.

This Court, for instance, in disciplining an attorney for violations of Rules 1.1, 3.4(3), 8.1(2) and 8.4(4) issued a reprimand and ordered him to take CLE courses and pay restitution.

The conduct at issue in that case, *Office of Disciplinary Counsel v. Cramer*, CV196085504S (Superior Court 2019), was the attorney's failure to properly prosecute a personal injury action and defend a summary judgment motion, which led to financial

[3] *See* https://www.nhregister.com/news/article/Norm-Pattis-explains-how-he-defends-Fotis-Duolos-14059996.php This Court has considered an attorney's absence of a prior disciplinary record and personal background in deciding to issue a reprimand and MCLE requirements. *Office of Disciplinary Counsel v. Cramer,* No. CV196085504S, (Superior Court, Judicial District of Fairfield at Bridgeport, June 27, 2019) (Bellis, J.).

injuries to his client. He further failed to respond to the grievance and make payments on a civil judgment to the former client.

Grievance committee decisions for other oversights and errors in practice counsel toward education. In *King v. Abel*, Grievance Complaint #05-1117 (May 12, 2006), an attorney was found to have violated Rule 1.3 for failing to file a fee waiver for an indigent criminal client to pursue an appeal following conviction after a trial. She filed other forms but did not make copies for her own file. The Grievance Committee did not find violations of Rules 1.1 or 8.4(4). She was found to be knowledgeable of the criminal process and post-conviction filings. She should however, have maintained copies of those documents. For that reason, she was required to attend at least three hours of CLE with a focus on criminal appellate procedure. *Whitney v. Cuddy*, Grievance Complaint #11-0906 (June 8, 2012), concerned a violation of Rule 1.15(b). The attorney, who represented a client in a divorce, held silver bars and coins belonging to the client's husband's brother in a safe deposit box. He did not properly inventory the contents of the box and effectively co-mingled the other party's property with property belonging to others, leading to the silver bars being returned to their owner while the coins were accidentally released to the client. The Committee ordered the attorney to take three hours of CLE in Legal Ethics rather than reprimand him or order a presentment.

The facts of the present case are unique, however *Norton v. Knight*, Grievance Complaint #00-0830, also involved the release of psychological records. The attorney had obtained the psychological records of an opposing party in litigation and forwarded them to an attorney who was representing the party's wife in an unrelated family court

matter. The second attorney used the information against the party. The Committee found that the attorney violated Rule 4.4 and issued a reprimand.

The disclosure in this case was not malicious. At most it was made through a misunderstanding of a confidentiality order and inexperience with digital discovery. Further, Attorney Pattis' integrity cannot be impugned for not taking responsibility for any mistake. He did so, promptly writing to Attorney Mattei and advising as to what he believed may have occurred.

Moreover, the information was not used against the subjects of the health information but by an attorney who represented parties aligned with them against Attorney Pattis' client. If the Court determines that discipline is warranted [it should not], it should consider educational requirements rather than reprimand or suspension. It would not only serve as a corrective measure, but also, as Attorney Pattis is prominent member of the bar and this is a case of high media attention, it could also serve to educate and assist other attorneys.

SUMMATION OF ALLEGED COMMON FACTS AND ALLEGED DISCIPLINARY VIOLATIONS

The purported disciplinary violations all stem from the same alleged facts, that being that Attorney Pattis' firm sent bankruptcy Attorney Lee Plaintiffs' confidential and attorneys-eyes only discovery, who then provided the same to Attorney Reynal, who in turn inadvertently disclosed the discovery to Attorney Bankston in Texas.

There is no allegation that the discovery went beyond any of the Attorneys referenced. And pursuant to Attorney Mattei's testimony Attorney Bankston was trusted

enough for Attorney Mattei to himself provide the Defendants' confidential discovery at his volition.

Disciplinary Counsel alleges violations of Rule 1.1 (competence), Rule 3.4 (fairness to opposing party and counsel), Rule 5.1(b) (responsibilities of partners, managers, and supervisory lawyers) Rule 8.4(4) (conduct prejudicial to the administration of justice), and Rule 1.15(b) (property of another) of the Rules of Professional Conduct as well as Conn. Gen. Stat. Section 52-146e and will each be addressed in turn. Rule 5.3 of the Rules of Professional Conduct is not addressed as Disciplinary Counsel concedes no violation of this rule.

CLEAR AND CONVINCING EVIDENCE STANDARD

Evidence is clear and convincing when "it induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." *In re Giovanni C.*, 120 Conn. App. 277, 279 (2010) (quoting *Miller v. Commissioner of Correction*, 242 Conn. 745, 794-95 (1997)).

As set forth more fully within, is respectfully asserted that the requisite clear and convincing proof does not exist for any of the alleged violations. "[C]lear and convincing proof denotes a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution.... [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Internal quotation marks omitted.)

Henry v. Statewide Grievance Committee, 111 Conn.App. 12, 21 n. 9, 957 A.2d 547 (2008).

Here the primary evidence presented against Attorney Pattis is an uncorroborated email and the testimony and other evidence speaks at best to an inadvertent disclosure undeserving of discipline.

"KNOWINGLY" IN ATTORNEY DISCPLINE PROCEEDINGS

Utilizing both the definitions of knowingly in R.P.C. 1.0(g) and Conn. Gen. Stat. § 53a-3(12), the Connecticut Supreme Court, in *Disciplinary Counsel v. Parnoff,* 324 Conn. 505, 515 (2016), concluded that someone "acts knowingly when he or she has actual knowledge or awareness of the nature of the act." There, the court determined that the attorney did not knowingly misappropriate client funds even though he had moved them from escrow into his own account because he thought that he was entitled to them. The court reasoned that while he might have been negligent or incorrect, he did not have the intent to steal. Id. at 517.

In this case, Disciplinary Counsel must prove *inter alia*, by clear and convincing evidence that Attorney Pattis "knowingly" violated the March 7, 2022 Confidentiality Order and that a violation of the March 7, 2022 Confidentiality Order itself constituted a violation of the disciplinary rules alleged in the Show Cause Notice.

Respectfully, the record fails in this regard.

ATTORNEY DISCIPLINE PROCEEDINGS AND DUE PROCESS

Attorneys have a vested right to practice law and a property interest in their law licenses. Any sanction for professional misconduct impacts that right. *Briggs v. McWeeney*, 260 Conn. 296, 322 (2002). As such, "[b]ecause a license to practice law is a

vested property interest, an attorney subject to discipline is entitled to due process of law ... In attorney grievance proceedings, due process mandates that [b]efore discipline may be imposed, an attorney is entitled to notice of the charges, a fair hearing and an appeal to court for a determination of whether he or she has been deprived of these rights in some substantial manner." (Citation omitted; internal quotation marks omitted.) *Statewide Grievance Committee v. Egbarin*, 61 Conn.App. 445, 456, cert. denied, 255 Conn. 949, 769 A.2d 64 (2001).

RULE 5.1(B)

The Commentary to Rule 5.1(b) reads that "Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm." Id., underline supplied. As there is no dispute that Attorney Reynal is not a member of Attorney Pattis' law firm, Attorney Pattis cannot be sanctioned under Rule 5.1(b) for Attorney Reynal's conduct or omissions. Moreover, Disciplinary Counsel concedes that Attorney Reynal's pro hac vice admission was only granted conditionally on July 20, 2022, that condition (filing a notice of appearance within 10 days) never occurred (Disciplinary Counsel Brief at 9 of 27) and Attorney Pattis was terminated in April of 2022 (Tr. August 25, 2022 at 73-74). All of which makes a tenuous argument that Attorney Reynal was ever *ab initio* properly admitted[4] to practice in Connecticut *pro hac vice* as the condition was unsatisfied or the Attorney Pattis was responsible for his actions. Additionally, Rule 5.1 is not a rule of vicarious liability it is a rule of supervisory authority, which did not exist in this case as Attorney Reynal was not a member of Mr. Pattis' firm, nor was he properly admitted to practice law in Connecticut without the conditions being satisfied.

[4] The argument that Attorney Reynal's conditional admission was completed and thereby Attorney Pattis is liable for Attorney Reynal's conduct is internally inconsistent as if Attorney Reynal was properly admitted he would be covered as "counsel of record in this action" under the Confidentiality Order.

Even if the Court were to consider paragraph 19 of the Confidentiality Order as providing a "claw back" mechanism, Attorney Pattis took the requisite steps to notify Attorney Mattei and Attorney Mattei did notify Attorney Bankston, all consistent with paragraph 19.

Disciplinary Counsel's only other contention with respect to Rule 5.1(b) is that "Pattis failed to instruct the associate, or himself take any action to remediate the wrongful disclosure." (Disciplinary Counsel Brief at 16 of 27). However, the record is completely devoid of what Attorney Pattis allegedly failed to instruct or actions Attorney Pattis took or failed to take with respect to any associate, and therefore the clear and convincing proof requirement is not met. It is unclear exactly what else Disciplinary Counsel is positing that Attorney Pattis was required to instruct considering that Attorney Pattis promptly reached out to Attorney Mattei, Attorney Mattei reached out to Attorney Bankston and Attorney Reynal, and Attorney Pattis' firm requested the return of the discovery.

RULE 1.1

In relevant part, Rule 1.1. Competence, reads "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Id.

Disciplinary Counsel alleges Rule 1.1 was violated as Attorney Pattis' allegedly "failed to provide even the minimal amount of care when instructing his associate to transfer all of this discovery to attorney Lee, an unauthorized recipient." (Disciplinary Counsel Brief at 14 of 27). Disciplinary Counsel alleges that "neglect is further

compounded by the fact that Pattis failed to take appropriate steps to secure the information once he learned of the disclosure. (Disciplinary Counsel Brief at 14 of 27).

Aside from the fact that a singular error or misinterpretation of a Confidentiality Order would not constitute incompetence, Rule 1.1 is intended as a disciplinary rule for the protection of an attorney's own clients, not third parties. The Commentary to Rule 1.1 reads "In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances." Id. Yet Disciplinary Counsel does not set forth what proficiency was lacking of Attorney Pattis, or what expertise, if any, beyond a general practitioner was required. Again, it assumes facts not in evidence, as there was no proof presented as to what was instructed of Attorney Pattis' associate or what steps Attorney Pattis took to secure the information once he learned of the disclosure. Again, it is unclear exactly what steps Disciplinary Counsel is alleging that Attorney Pattis was required to take after he learned of the inadvertent disclosure, or why Attorney Pattis should expect that Attorney Bankston and Attorney Reynal as attorneys would not take steps to adequately protect the information once the inadvertent disclosure became evident. The Court cannot ignore that Attorney Mattei testified that he was sharing defendants' discovery with Attorney Bankston already and thus had a relationship of trust sufficient enough to disclose discovery to Attorney Bankston directly without concern. The incongruence is obvious.

Nonetheless there is simply no evidence of incompetence on the part of Attorney Pattis in representing his client, or in his conduct throughout the action as a whole. The Statewide Grievance Committee in declining to find a violation of either Rule 1.1 or 8.4(4) for an attorney who failed to provide necessary paperwork for a defendant who

wished to appeal a 13-year sentence, decided "[t]he Respondent was clearly competent to represent the Complainant and thoroughly knowledgeable in the post-sentence filings." *See* matter of *Tyrone King vs. Heather A. Abel*, Grievance Complaint #05-1117, Decision May 12, 2006.

RULE 3.4(3)

Certainly the Court can appreciate the difference between an attorney who "knowingly disobey[s] an obligation under the rules of a tribunal" under DR 3.4(3), and an attorney making an inadvertent mistake or a misinterpretation in the context of a recently amended Confidentiality Order. Even if Disciplinary Counsel is proven correct that Attorney Lee was an unauthorized person under the Confidentiality Order that alone does not end the inquiry for a disciplinary violation. To argue that every lawyer that makes an innocent and unintentional mistake or inadvertently misinterprets a provision in a Confidentiality Order should be subjected to sanctions would result in substantial injustice.

Would it be unreasonable to believe that an attorney retained by some of the same clients (*e.g.*, certain of the defendants) on parallel bankruptcy proceedings which Attorney Lee represented would not arguably fall within the parameters of permissible persons entitled to the litigation documents? If so, wouldn't it be unreasonable for Attorney Mattei to have been permitted to share defendants' discovery with Attorney Bankston, or Shipman & Goodwin at his sole discretion. Juxtaposed, it would not appear objectively to sound in fairness.

In more detail below, based on the record, a negative inference cannot inure from Attorney Pattis' assertion of his right against self-incrimination. The questioning of

Disciplinary Counsel did not properly specify whether Attorney Pattis was being asked about his awareness of the original or the amended March 7, 2022 protective order (in fact there were no less than three (3) versions of the confidentiality order at different time periods in this case). In fact, the only questioning by Disciplinary Counsel upon Attorney Pattis was with regard to the June 16, 2021 amendment to the Confidentiality Order (which only read "counsel of record" and not "counsel of record in this case") at Docket Entry No. 356. The later amended Confidentiality Order of March 7, 2022 (*see* Docket Entry No. 711.00, 711.10) was not the subject of the questioning. The clear and convincing standard cannot be deemed to have been met under such circumstances.

RULE 1.15(b)

Rule 1.15(b) reads "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation."

No evidence is present within this record to demonstrate in any manner that Attorney Pattis did not hold Plaintiff's discovery separate from his own property or that of his business. The Rule is obviously intended to protect property with monetary value, *e.g.*, "funds" "account funds" which is not applicable here as there has been no evidence that the discovery has independent monetary value. Even if Disciplinary Counsel had overcome the foregoing, there is no evidence presented that the actual discovery when

opened was not identifiable or safeguarded appropriately when it went only from Attorney to Attorney. This alleged rule violation does not fit within the alleged conduct in this case.

The Commentary to Rule 1.15(b) reads in relevant part, "All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if moneys, in one or more trust accounts" It is clear that the intended import of Rule 1.15(b) is the separation of client's or third party's property, primarily monetary from the Attorney's personal or business property. In essence, it is promulgated to protect against commingling. For example, in *Nathalee Lewis-Golden vs. Alisha Mathers*, Grievance Complaint #20-0135, Decision December 17, 2021, the Statewide Grievance Committee decided that there was insufficient evidence that the Respondent violated Rule 8.4(4) but found "[t]he Respondent violated Rule 1.15(b) and (d) of the Rules of Professional Conduct by failing to put her unearned legal fee in a separate client's trust account" a reprimand was the punishment. See also *Jeffrey Whitney vs. James Cuddy*, Grievance Complaint #11-0906, Decision June 8, 2012, the punishment for a Rule 1.15(b) violation was mandatory continuing legal education courses in legal ethics.

But as to Attorney Pattis, there is not the slightest evidence of comingling on this record, and therefore Rule 1.15(b) does not formulate a basis for Attorney discipline.

The record shows that Attorney Lee was made aware of the Confidentiality Order by prior counsel for the defendants, by his own paralegal's research (*see* Transcript August 25, 2022 at 129-130), and the litigation was and is a public record which Attorney Lee was capable to review as an experienced attorney. It is unclear what Disciplinary

Counsel is alleging that Attorney Pattis was required to do under these circumstances when Attorney Lee already had notice of the Confidentiality Order.

All of this is assuming that "property" within Rule 1.15(b) even applies to discovery material, an assumption for which no authority has been adduced. The Rules imply otherwise. By way of example and not limitation, Rule 1.15(e), provides in relevant part that a lawyer coming into possession of property in which a third party has an interest shall "promptly notify ... the third person." Impractically, if material produced in discovery was covered by Rule 1.15, a lawyer would have an obligation to inform each and every third party whose information was included in the discovery production. Equally as important, Rule 4.4(b) specifically addresses the issue of inadvertent disclosure, which speaks soundly against the extension Disciplinary Counsel is attempting here with Rule 1.15.

No violation of Rule 1.15(b) has been proven.

RULE 8.4(4)

The oft termed "catch-all" provision of the Disciplinary Rules, Rule 8.4(4) states that it "It is professional misconduct for a lawyer to: "Engage in conduct that is prejudicial to the administration of justice." Disciplinary Counsel relies on "Pattis' transfer of Connecticut plaintiffs' highly confidential medical records that violated the court ordered protective order is clear and convincing evidence of a violation of rule 8.4(4)." (Disciplinary Counsel Brief at 18 of 27).

Since the primary basis for all of the alleged disciplinary violations hinges on the alleged violation of the Confidentiality Order, the Court must look first to the Confidentiality Order to determine if it was clear and unambiguous. This inquiry should

be similar to a review of a contempt, as a civil contempt may be founded only upon a clear and unambiguous court order. See *Blaydes v. Blaydes*, 187 Conn. 464, 467, 446 A.2d 825 (1982); see also *Dowd v. Dowd*, 96 Conn. App. 75, 79. The inquiry then extends to whether the violation of the Court Order was willful or excused by a good faith dispute or misunderstanding. See *Ramin v. Ramin*, 281 Conn. 324, 336, 915 A.2d 790 (2007); see also *Eldridge v. Eldridge*, 244 Conn. 523, 526-27, 529, 710 A.2d 757 (1998).

Yet Disciplinary Counsel does not appear to consider that a good faith dispute or misunderstanding could have occurred here. Objectively Disciplinary Counsel's position in this regard is not a reasonable one.

But this Court can and should give due consideration to the fact that the Confidentiality Order since at least 2019 through March 7, 2022 used the undefined term "counsel of record" and only on March 7, 2022 changed that term to "counsel of record in this action" The fact remains that Attorney Lee as of April 17, 2022 had filed a notice of appearance in the Texas bankruptcy which would qualify Attorney Lee as counsel of record in that action. Attorney Reynal and Attorney Bankston were counsel of record for defendants and plaintiffs respectively, in the Texas state court litigation.

The Court also should also consider that the defendants were as would be reasonably expected, collaborating in a joint defense. *See* Transcript of Attorney Reynal's Testimony as follows:

Q Thank you. Just going back to something you had mentioned in your earlier testimony. **Did there come a point where you told Mr. Pattis that he was fired?**
A **There did**.
Q Do you know approximately when that was?
A It was in **late April 2022**.

Q Okay. And also addressing the – when Mr. Pattis first had – with respect to the April firing of Mr. Pattis, was it your expectation that you were going to become lead counsel in Connecticut?
A No.
Q Okay. Was there any expectation of you looking for counsel in Connecticut?
A Yes.
Q Okay. And in, I believe you said February or March 2002, when Mr. Pattis – '22, when Mr. Pattis first contacted you. Was it your understanding at that time that you would also be working on the case in Connecticut in any manner?
A Yes. Mr. Pattis and I discussed the – that **it would be best for the client, best for us, if we collaborated on the Texas case and Connecticut**.
(Transcript August 25, 2022 at 73-74, bold and underline supplied).

This is not entirely dissimilar to what Attorney Mattei testified to with respect to his relationship and disclosures to Attorney Bankston:

> A - you know, I have a very strong relationship with Attorney Bankston.
> Q Have you shared documents with Mr. Bankston throughout these proceedings?
> A Oh yes.
> Q Any discovery documents?
> A Oh yes.
> Q Okay. Anything – **have you shared any documents related to the discovery that's been provided by the defendants in this case?**
> A **I'm sure that I have**.
> Q **Have you shared any documents that have been marked confidential**?
> A **I'm sure that I have**.
> (Transcript August 17, 2022 at 34-35, bold and underline supplied).

Internally inconsistent would be a finding that it is acceptable for Attorney Mattei to provide discovery to Attorney Bankston, but that Attorney Pattis is wholly restricted. Such a finding would draw an appearance of unfairness from any outside observer of these proceedings, even if by some technicality the Confidentiality Order allows it.

In any event, even assuming arguendo this Court finds a violation of the Confidentiality Order [the Court should not], it should be considered a technical violation, which was not willful and which objectively may be excused by a good faith dispute or misunderstanding of the Confidentiality Order in the context of the complexity of the multiple confidentiality orders.

In any event, even if a finding of a violation of Rule 8.4(4) were to occur, for a first offense suspension has not been the appropriate punishment. See *Yamin v. Statewide Griev. Comm.*, 53 Conn. App. 98 (Appellate Court of Connecticut, April 27, 1999) (reprimand for Rule 8.4(4) violation reversed).

CONN. GEN. STAT. SECTION 52-146E

Conn. Gen. Stat. section 52-146e required Disciplinary Counsel to prove that any disclosure was "without the consent of the patient or his authorized representative" Id. The requirement to prove that disclosure was without consent is part of the mandate of the statute, it is therefore part of the *prima facie*, or case-in-chief in any civil case and thus a prerequisite in this disciplinary hearing. Non-consent may not be inferred and no plaintiffs testified in this hearing. Thus, there was no clear and convincing evidence presented that any of the alleged disclosures were without consent. Accordingly, there can be no ground for discipline based on Conn. Gen. Stat. section 52-146e. The burden of proof by clear and convincing evidence is not met by "naked allegations" *Shelton v. Statewide Griev. Comm*., 277 Conn. 99 (Supreme Court of Connecticut 2006).

The Court should be aware that in the matter of *Kristin Norton v. Charles Knight*, Grievance Complaint #00-0830, a complaint involving the disclosure of psychological records which were not only wrongfully disclosed but were also utilized in detail in a

separate action, the Statewide Grievance Committee decided that only a reprimand was an appropriate punishment.

In this matter, there is no allegation that any of the alleged records were utilized in any other proceeding evidencing how disproportionate suspension would be as to Attorney Pattis.

THE HISTORY OF THE LANGUAGE WITHIN CONFIDENTIALITY ORDER FOR YEARS PRIOR TO MARCH 7, 2022 SUPPORTS A FINDING OF NO DISCIPLINARY VIOLATION

The Confidentiality Order at issue in this case reads at paragraph 12 "Access to HIGHLY CONFIDENTIAL-ATTORNEYS EYES ONLY information shall be limited to the following categories of persons:

a. Counsel of record in this action, and staff persons employed by such counsel who reasonably need to handle such information."

As is discerned in the Plaintiffs' filing of Docket Entry No. 711.00 the March 7, 2022 motion to change the protective order, included the change of "in this action", evidencing that the original intended reading was "a. Counsel of record, and staff persons employed by such counsel who reasonably need to handle such information."

In point of fact, the prior confidentiality order of February 22, 2019 at Docket Entry No. 185.00 reads:

"11. Access to Confidential Information shall be limited to the following categories of persons ("Qualified Persons") with such status in this case and all cases consolidated with this case:

a. **All counsel of record**, including staff persons employed by such counsel;"

The definition section of Docket Entry No. 185.00 does not define the term "counsel of record, leaving it open to interpretation.

The Plaintiff's requested modifications of the protective order on June 8, 2021 at Docket Entry No. 356.00 not only did not remove the "all counsel of record" terminology in paragraph 11 of Docket Entry No. 185.00 but sought to add paragraph 11A the attorneys eyes only provision, which again included the "all counsel of record" phrase which had been in the protective order since 2019. And the June 8, 2021 modification still did not define "counsel of record".

Thus, Attorney Pattis, and all other counsel, since at least 2019 had been operating under a broad, and undefined "counsel of record" terminology in the confidentiality order which a reasonable objective attorney could have determined that Attorney Lee satisfied.

The long history of the language of the confidentiality order as "counsel of record" and the only recent change could have easily led and caused an innocent misinterpretation or technical albeit inadvertent mistake by any attorney, including Attorney Pattis. It is not a ground for discipline.

To recapitulate, the Court should consider that Attorney Lee was Counsel of record in other actions, such as U.S. Bankruptcy Court Southern District of Texas (Victoria) Bankruptcy Petition #: 22-60020, filed April 17, 2022. And pursuant to Attorney Lee's own testimony cooperation with the state litigators was anticipated.

ATTORNEY LEE'S TESTIMONY SUPPORTS A FINDING OF NO DISCIPLINARY VIOLATION

Attorney Lee testified that he was representing three of the defendant companies in bankruptcy, as follows:

Q And is it true that you stated that you considered

yourself as counsel of record, and that's one of the reasons why you weren't concerned about the confidentiality order?

A The answer I believe is that, I represented Info W, the debtor in possession. And in Texas we don't use the word counsel of record. And that's the reason I'm confused right now. But the answer I believe in our discussion was because I was representing Info W, and it was for attorneys' eyes only, that's why I felt comfortable saying, I didn't need to do any more work in reading the confidentiality order. That's what I meant.

Q Okay.

A And the only reason I'm hesitating in any way today, is because I'm being fearful as to the term counsel of record. Because it's not something I use in Texas.

Q I see.
A But I could tell you that **we were representing the three companies in bankruptcy, as their bankruptcy counsel**.
(Transcript, August 25, 2022 at 149, bold and underline supplied).

Attorney Lee's testimony continued:

Q And is it true that the purpose of the – I'm sorry – I apologize. Withdrawn. **Is it true that the purpose of the remand was to get the state court cases into bankruptcy court?**

A Yes. **That's correct**.

Q Okay. **And to be tried on the merits there?**

A Yes. **That is correct too**.

Q Okay.
(Transcript, August 25, 2022 at 149-150, underline supplied).

Attorney Lee elaborated as to his role in the Texas Bankruptcy case as follows:

A My main job as a general bankruptcy counsel is to lead the debtors through the Chapter 11 process, and in this case for the three debtors, my job was to try to implement an overall restructuring of the claims against the three

> debtors. And in this case in the Info W case, **the major claims were the claims of the Connecticut plaintiffs**, as well as the Texas plaintiffs. And prior to the bankruptcy case, we had negotiated an overall agreement with the equity owners of the companies called FSS, as well as Mr. Jones. For them to contribute over a five-year period, ten million dollars into a trust to be established pursuant to a plan of reorganization. Such that, **if the participants, including the Connecticut and the Texas plaintiffs, were to participate, they would be able to get a distribution in accordance with the plan, a pro rata distribution** of ten million dollars over the next five years of the plan. So my job was to try to get that implemented as a part of the Chapter 11 process for Info W and the other two debtors. That was my primary goal at the beginning of the Chapter 11 process.
> (Transcript, August 25, 2022 at 122-123, bold and underline supplied).

Notably, if there was a distribution through the bankruptcy court, it would be reasonably expected that each of the individual plaintiff's respective proportionate share would depend on the extent of their alleged injuries of which their medical records would be considered in relation to one another. This constitutes another reason that this Court cannot simply infer "non-consent" is that a distribution would have required disclosure of each participating Plaintiff's medical records to determine pro-rata share. And of course Attorney Lee would be privy to those records.

Despite Disciplinary Counsel's arguments that the defendants' medical records were not necessary, Attorney Lee testified:

> A More accurately **I had made a request for all discovery that had been done in both the Connecticut** and the Texas State Court litigation that took place, to make sure that in connection with the three emergency motions to lift stay, that I had scoured the record, to make sure there weren't things in there that were going to be used against the debtors in the litigation. And I wanted to make sure that I had a chance to look over the record, or the discovery, so that - I needed to look over four years of discovery to protect the client with respect to the

emergency motions to dismiss the bankruptcy cases.
(Transcript, August 25, 2022 at 127, bold and underline supplied).

A I did not know what the plaintiff's had produced in connection with the litigation in both Texas and Connecticut. **So I asked for anything from both Texas and Connecticut counsel**, because when I asked both sets of counsel about trying to narrow that scope, they were not able to help me, in light of the number of loaners that had represented the defendants in the last two or three years, as well as the state of discovery in both sets of litigation.
(Transcript, August 25, 2022 at 128, bold and underline supplied).

A Not at all. I've been in many bankruptcy cases with lots of litigation before, and **it's been a routine practice for me to ask the state court litigators for the discovery, because many of the issues that have risen, come up again in the bankruptcy case**, and it's routine for me to ask my state court litigators for that discovery, so that I know what's out there before I go to the bankruptcy court on a matter or hearing relating to many of the bankruptcy issue. And they cross over into what's been already produced in the state court system.
(Transcript, August 25, 2022 at 135, bold and underline supplied).

Disciplinary Counsel does not, and could not reasonably contend, particularly on the lack of evidence in this record, that Attorney Pattis should have known that despite Attorney Lee's request for all state court litigation documents, that Attorney Pattis had an expertise in bankruptcy to the extent that he should have determined that Attorney Lee's request was wrong and overbroad in the context of bankruptcy law. Further, it would be unreasonable to expect that a bankruptcy attorney working on a fund for pro-rata, or proportional distribution would not need the medical records of the individual plaintiffs in order to aid in determining the amount of each share.

Lastly, it would seem important for the date of the disclosure to be established if a disciplinary violation is to be found, but here, the exact date of the disclosure of the discovery was not even known by Attorney Lee:

> Q What was the date that you received the external hard drive?
>
> A Attorney Staines, I do not know the exact date. I do know that there – it was sent to my office at 700 Milan. It was sent from Pattis & Smith. It came in a like a bubble wrap, and it was a white external Seagate technology external drive. And with a cover letter from, I think from Cameron Atkinson. But **I don't know the exact date when it arrived in Houston**.
> (Transcript, August 25, 2022 at 131, bold and underline supplied).

ATTORNEY REYNAL'S TESTIMONY SUPPORTS A FINDING OF NO DISCIPLINARY VIOLATION

Disciplinary Counsel's position that Attorney Pattis was under a supervisory role with respect to Attorney Reynal is not possible in light of the fact that Attorney Pattis had been fired by the client.

Q Thank you. Just going back to something you had mentioned in your earlier testimony. **Did there come a point where you told Mr. Pattis that he was fired?**

A **There did**.

Q Do you know approximately when that was?

A It was in **late April 2022**.

Q Okay. And also addressing the – when Mr. Pattis first had – with respect to the April firing of Mr. Pattis, was it your expectation that you were going to become lead counsel in Connecticut?

A No.

Q Okay. Was there any expectation of you looking for

counsel in Connecticut?

A Yes.
(Transcript August 25, 2022 at 73-74).

THE ABA STANDARDS FOR IMPOSING LAWYERS SANCTIONS DO NOT JUSTIFY ATTORNEY DISCPLINE

The Rules of Professional Conduct define attorney misconduct but do not provide guidelines for appropriate sanctions. *Statewide Grievance Committee v. Glass*, 46 Conn. App. 472, 481 (1997). Connecticut courts often turn to the American Bar Association's Standards for Imposing Lawyer Sanctions, although they have not been formally adopted in this state. Id. In determining whether a discretionary disbarment was a proper penalty, the Connecticut Supreme Court has analyzed whether "it was disproportionate to the violations found." *Burton*, 267 Conn. at 53.

The ABA standards also provide aggravating and mitigating factors for courts to consider in deciding appropriate sanctions. Mitigating factors applicable here under Section 9.32, is the absence of a prior disciplinary record of which Attorney Pattis has none, the absence of dishonest or selfish motive; timely good faith effort to make restitution or to rectify and showing remorse (Attorney Pattis promptly contacted Attorney Mattei upon realizing the records had reached Attorney Bankston and took other measures as outlined in his email) his good character or reputation was proven, and he cooperated throughout the proceedings.

Review of misconduct are guided by the use of the American Bar Association's Standards for Imposing Lawyer Sanctions which has been approved by the Connecticut Supreme Court. *Burton v. Mottolese, supra*, 267 Conn. 55 and n.50. The Standards provide that, after a finding of misconduct, a court should consider: "(1) the nature of the

duty violated; (2) the attorney's mental state; (3) the potential or actual injury stemming from the attorney's misconduct; and (4) the existence of aggravating or mitigating factors." A.B.A., Standards for Imposing Lawyer Sanctions (1986) Standard 3.0; see also *Burton v. Mottolese, supra*, 55.

The Standards list the following as aggravating factors: "(a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of law; (j) indifference to making restitution and (k) illegal conduct, including that involving the use of controlled substances." A.B.A., Standards for Imposing Lawyer Sanctions (1986) Standard 9.22; see also *Burton v. Mottolese, supra*, 55.
The standards also list the following mitigating factors, (a) absence of prior disciplinary record, (b) absence of dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (f) character or reputation; (g) physical or mental disability or impairment; (h) delay in disciplinary proceedings; (i) interim rehabilitation; (j) imposition of other penalties or sanctions; (k) remorse; and (l) remoteness of prior offenses.
See *Burton v. Mottolese*, supra, 55.

The ABA Standards for Imposing Lawyer Sanctions (hereinafter "ABA") Section 1.3 requires "clear and convincing evidence" of a disciplinary violation. Prior to imposing a sanction a court should consider "the duty violated," the lawyers "mental state," "potential or actual injury caused by the lawyer's misconduct" and "aggravating or mitigating factors."

The ABA Standards for Imposing Lawyer Sanctions Section 9.3 provides that mitigation or mitigating circumstances may justify a reduction in the degree of discipline to be imposed. Relevant here are (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; and (g) character or reputation.

Numerous well-respected attorney character witnesses testified on behalf of Attorney Pattis in these proceedings. Each of which testified as to Attorney Pattis' high ethical character and reputation as an attorney. These character witnesses included:

- Attorney Richard Colangelo, former Chief State's Attorney and Stamford State's Attorney and State's Attorney on the high-profile *State v. Dulos* case;
- Attorney Stephen Sedensky, former Danbury State's Attorney and author of the State's Attorney's Sandy Hook report;
- Attorney Matthew Maddox;
- Attorney Elizabeth Kushner;
- Attorney Harry Weller, retired senior appellate counsel for the Chief State's Attorney's Office in Wallingford;
- Attorney Matthew Gedansky, State's Attorney Tolland.

No testimony was elicited to rebut any character witnesses. Disciplinary Counsel should have considered this character evidence as a mitigating factor.

No evidence was adduced that Attorney Pattis had a dishonest or selfish motive in any respect.

None of the aggravating factors in Section 9.22 of The ABA Standards for Imposing Lawyer Sanctions were shown to exist during these proceedings, and thus under Section 9.21 there should be no increase in the degree of discipline.

Under ABA Section 4.52 suspension is generally appropriate when a lawyer "engages in an area of practice in which the lawyers knows he or she is not competent, and causes injury or potential injury to a client." A single instance of a misinterpretation as to a Confidentiality Order does not suffice for incompetence, no client was injured, and there was no potential injury as all receivers of the discovery were attorneys and is otherwise speculative. The standard for reprimand under ABA Section 4.43 is not met as there was no evidence demonstrating Attorney Pattis failed to "understand relevant legal doctrines or procedures and causes injury or potential injury to a client" or was "negligent in determining whether he or she is competent….and causes injury or potential injury to a client." Even admonition under ABA Section 4.54 is tenuous on this record.

Here there has been no showing that any of actual injury, and any potential injury is wholly speculative on this record. Particularly as no Plaintiff testified that they would not consent to their records being provided to Attorney Lee for purposes of the anticipated pro-rata fund if the opportunity had presented itself at the time. The individual responses of the respective Plaintiffs could not and cannot be inferred in a case of this magnitude. And in fact it would be highly unusual for a Plaintiff not to consent to such

information to be provided to a Bankruptcy Attorney or Trustee in the context of such a fund.

As to actual or potential injury, Attorney Pattis' obligations under ABA Section 4.5 are only to prevent injury to his client of which there is no evidence of injury to his clients. The potential harm to the Connecticut Plaintiffs is not relevant to ABA Section 4.5. The ABA Standards dictate that no discipline be imposed under 4.5.

With respect to ABA Section 6.2, the ABA Standards define potential injury as, "the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." It is not reasonably foreseeable that a disclosure to a Bankruptcy Attorney (Attorney Lee) representing the same clients, or to a Texas Attorney (Attorney Reynal) would result in an inadvertent disclosure to Attorney Bankston, who ultimately destroyed all the information that he had downloaded. Attorney Mattei was aware by August 3, 2022 that Attorney Bankston had destroyed all information he had downloaded.

None of the information was ever viewed by anyone that was unauthorized and as none of the information was ever made public, there is no harm.

Without conceding that any conduct justifying attorney discipline can be found on this record, assuming arguendo the Court disagrees, at most mandatory continuing legal education but not as a sanction and in lieu of admonition would be appropriate.

ATTORNEY PATTIS CANNOT BE PUNISHED FOR EXERCISING HIS FEDERAL AND STATE CONSTITUITONAL AND STATUTORY RIGHTS UNDER U.S. CONST. AMEND V, THE CONNECTICUT CONSTITUTION AND THE RELEVANT CONNECTICUT STATUTES

Disciplinary Counsel's suggestion that Attorney Pattis' decision to exercise his constitutional and statutory rights to remain silent, and that the exercise of these rights constitute an "aggravating factor" is incorrect, and violates Attorney Pattis' constitutional rights both under the U.S. Constitution, Article first section 8 of the Connecticut Constitution; Conn. Gen. Stat. § 52-199; Conn. R. Evid. 5-1, and Conn. Gen. Stat. § 51-35(b).

First, there is no support for such a finding and doing so would be contrary to the dictates of *Spevack v. Klein,* 385 U.S. 511, 514 (1967).

The Fifth Amendment privilege is applicable when a witness reasonably "apprehend[s] danger from a direct answer," and also "protect[s] innocent men . . . who otherwise might be ensnared by ambiguous circumstances." *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (citation and internal quotation marks omitted).

The Fifth Amendment privilege against self-incrimination does apply in attorney disciplinary proceedings. See *Spevack v. Klein,* 385 U.S. 511, 514 (1967)) (lawyer may not be disciplined solely for asserting the privilege against self-incrimination in bar disciplinary proceedings). The majority in *Spevack v. Klein, supra*., held:

> "We conclude that *Cohen v. Hurley* should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it s**hould not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it**." Id. at 514, underline supplied.

The concurrence in *Spevack v. Klein* was quite direct in this analysis, and distinguished lawyers from public employees in disciplinary proceedings:

> "a lawyer is not an employee of the State. [h]e does not have the responsibility of an employee to account to the State for his actions because he does not perform them as agent of the State. [h]is responsibility to the State is to obey its laws and the rules of conduct that it has generally laid down as part of its licensing procedures. [t]he special responsibilities that he assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, of his Fifth Amendment rights. [a]ccordingly, I agree that Spevack could not be disbarred for asserting his privilege against self-incrimination." Id. at 520.

Other states, post-Spevak, have followed the same logic. See *Matter of Kenney*, 399 Mass. 431, 437 (1987), "[t]here is no doubt that a lawyer may not be sanctioned as a penalty for asserting the privilege against self-incrimination." Id. at 434, citing *Spevack v. Klein,* 385 U.S. 511, 514 (1967) (underline supplied). In fact, to punish an attorney for exercising his rights against self-incrimination encroaches on a dilemma of constitutional magnitude, this would include utilizing the invocation of the right against self-incrimination as an aggravating factor as suggested by Disciplinary Counsel.

Attorney Pattis is not the movant here, the Court has elected to assume the role of the movant by initiating these proceedings and ordering the Show Cause hearing. Disciplinary Counsel is proceeding in a quasi-prosecutorial function. In any scenario, Attorney Pattis is not the movant, and neither punishment nor a negative inference can inure for the invocation of his federal and state constitutional rights and state statutory rights.

The Second Circuit has made clear that a Court may not draw adverse inferences against a nonmoving party on summary judgment from a witness's invocation of the Fifth Amendment in a civil matter. *See Stichting Ter Behartiging Van de Belangen v.*

Schreiber, 407 F.3d 34, 55 (2d Cir. 2005). See also; *In re 650 Fifth Ave.*, 830 F.3d 66, 93 n.25 (2d Cir. 2016) (taking "exception to [district court's] suggestion that it could draw adverse inferences at summary judgment based on individuals' invocation of their Fifth Amendment privilege,").

There is a colorable argument that if the Second Circuit has saw fit to create a precedent that invocation of the Fifth cannot be held against a party on summary judgment in a civil matter, that a similar principle would be extended to an non-movant Attorney in a disciplinary proceeding in which the Show Cause notice alleges both disciplinary rule violations and state and federal criminal statutes which forces the Attorney to choose between his chosen profession and possible criminal prosecution.

Finally, Attorney Pattis adopts any arguments made by Attorney Reynal's Counsel to the extent not inconsistent with the arguments herein.

CONCLUSION

The record of these proceedings do not prove by clear and convincing evidence the violation of any disciplinary rule or statute justifying attorney discipline, and suspension as proposed by Disciplinary Counsel would be disproportionate even if a violation had been proven, the proceeding should be dismissed accordingly.

Dated: December 16, 2022

NORMAN PATTIS, ESQ.
BY HIS ATTORNEY

__/s/*Wesley R. Mead*/s/_____
By: Wesley R. Mead, Esq.
Attorney for Norman Pattis, Esq.
12 Boothbay Street
Milford, Connecticut 06460
Telephone: (718) 306-2107
Fax: (866) 306-0337
Juris No. 421460
Email: wmeadlaw@gmail.com

CERTIFICATION

I hereby certify that on December 16, 2022 a copy of the foregoing was sent by to the following: All counsel of record via the eservices filings system and electronic mail:

Koskoff Koskoff & Bieder PC
350 Fairfield Avenue
Suite 501
Bridgeport, CT 06604

Zeisler & Zeisler, P.C.
10 Middle Street
15th Floor
Bridgeport, CT 06604

Brian B. Staines, Esq.
State of Connecticut, Judicial Branch
Chief Disciplinary Counsel
100 Washington Street
Hartford, CT 06106

Brendon Levesque, Esq.
Barry, Barall, Taylor & Levesque, LLC
989 Main Street
Manchester, CT 06040
T: 860-649-4400
F: 860-645-7900
Blevesque@bbsattorneys.com

__/s/*Wesley R. Mead*/s/_____
By: Wesley R. Mead, Esq.
Attorney for Norman Pattis, Esq.
12 Boothbay Street
Milford, Connecticut 06460
Telephone: (718) 306-2107
Fax: (866) 306-0337
Juris No. 421460
Email: wmeadlaw@gmail.com